

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

COMMONWEALTH EDISON¹

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, AFL-CIO

Petitioner

Case 13-RC-20619

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

¹ The names of the parties appear as amended at the hearing.

² The positions of the parties as stated at the hearing and in their briefs have been carefully considered. The Petitioner submitted its brief by facsimile transmission on its due date and placed in the mail that same date. This is not permitted by the Board's Rules and Regulations, series 8, as amended, Section 102.114(g). The non-faxed brief was received in the Region the next business day. The Petitioner also filed a Motion to Accept Petitioner's Post-Hearing Brief the next business day which was also served upon the Employer. No opposition to the Petitioner's motion has been received, and it appearing that no prejudice resulted from the Petitioner's one day late filing of the brief, the motion of the Petitioner is hereby granted.

³ The Employer is a corporation engaged in the business of transmitting and distributing electric power to the northern one-third of the state of Illinois.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act for the following reasons:

FACTS

The Employer, Commonwealth Edison Company (“ComEd”), transmits and delivers energy through transmission lines, distribution lines, and substations to approximately three and a half million customers throughout the northern one-third of Illinois including Chicago and surrounding areas. ComEd’s service area covers 12,000 square miles and is comprised of seven regions: northeast, northwest, southeast, southwest, central, Chicago north, and Chicago south. Each region is further broken down into smaller local offices. Generating units, which are not owned by ComEd, produce electricity, which is transmitted to the transmission and distribution system. From the generator, the electricity goes through a transformer and is transmitted over power lines to a transmission substation where it branches out to service ComEd’s entire service territory. Throughout this system, electricity goes through a transformer where power is stepped down to smaller, safer levels of voltage for distribution. Electricity in the transmission substation is then sent to a transmission distribution center (“TDC”) where appropriate levels of electricity are distributed to customers based on their needs.

The Petitioner seeks to represent all load and operating dispatchers located at the Employer’s distribution dispatch center (“DDC”) located in Joliet, Illinois. There are currently 49 load dispatchers and 56 operating dispatchers⁴. The Employer, however, contends that the petition should be dismissed on the basis that the dispatchers are supervisors within the meaning of the Act. There is no history of collective bargaining regarding the dispatchers in the petitioned-for unit.

The DDC is a centralized facility where all of the dispatchers operate from and where the entire power distribution system is controlled. All of ComEd’s switching activity and communication with its

⁴ The individuals sought to be represented by the Petitioners are technically known as senior dispatchers and dispatchers, but have been historically referred to, and still are commonly referred to as operating dispatchers and load dispatchers. In this decision, the petitioned-for unit members will be collectively referred to as dispatchers unless otherwise noted specifically.

field personnel are conducted from the DDC. The purpose of the DDC is to provide safe, reliable service to customers, insure that the system is operated safely and reliably, and that service to customers is not interrupted. The DDC is staffed with dispatchers 24 hours a day, seven days a week, everyday of the year. Dispatchers work on one of four shifts: 6:00 a.m. to 6:00 p.m.; 6:00 p.m. to 6:00 a.m.; 6:00 a.m. to 2:00 p.m.; or 2:00 p.m. to 10:00 p.m. All dispatchers rotate through these six- and twelve-hour shifts so that they all work equal number of days and nights. Peak operating hours start from about 6:00 a.m. or 7:00 a.m. through the late afternoon, Monday through Friday. During these peak hours, the DDC is staffed with 15 operating dispatchers and 11 load dispatchers on shift. During non-peak hours, there are typically only six operating dispatchers and seven load dispatchers.

The Director of the DDC is Walter Kyle. The DDC Operations Manager, Jon Jobbe works directly below Kyle and supervises the ten shift managers at the DDC. Due to the rotating schedules, the DDC tries to have two shift managers on at all times, but after 10:00 p.m., there is only one shift manager on duty. Shift managers have direct supervision over the dispatchers throughout the day and night. At the DDC, there is also a clearance manager who manages all the scheduling activity at the DDC and scheduled work on the system. In addition to these individuals, the DDC also has arrangers and senior arrangers who work Monday through Friday, 7:00 a.m. to 3:00 p.m. The arrangers, in coordination with construction personnel, plan and prepare scheduled routines and switching jobs for repairs or maintenance. These scheduled jobs are then distributed to dispatchers and ultimately to field personnel to be carried out.

Field personnel include substation operators and troubleshooters, who perform all the switching under the direction of the load dispatcher inside the substations. "Switching" allows power to be redirected or redistributed in a manner that allows crews to isolate equipment that needs maintenance or repairs without interrupting power to customers. Substation construction crews make repairs or perform maintenance inside the substations under the direction of the load dispatchers. Overhead electrician specialists, or troubleshooters, perform all the switching outside the station on the overhead and underground facilities. During the normal business hours of 7 a.m. and 3 p.m., Monday through Friday,

field personnel are supervised by field supervisors or duty foremen although they receive instructions for switching orders and repairs from dispatchers. But during non-business hours, field personnel have no direct field supervision. Consequently, during the non-business hours, field personnel operate under the direction of load and operating dispatchers.

All dispatchers are assigned a geographical area or region. Dispatchers report to the DDC for work to a large room called the “arena.” In the arena, there are large consoles that are referred to as “pods,” each of which represents one geographical region. Load dispatchers are assigned a region or a section of a region and are responsible for operating all the transmission and distribution substations in that assigned geographical area. Operating dispatchers handle smaller areas than load dispatchers because the activity is much greater for operating dispatchers. Load dispatchers operate on the higher voltage system, specifically the 138 to 34 KV system, whereas the operating dispatchers direct the operations on the lower level distribution system. Dispatchers are primarily responsible for resolving system issues and maintaining electrical services to ComEd’s customers. This includes carrying out “routines” or scheduled switching orders for repairs and maintenance or restoring power to customers whose power has been interrupted. The latter is referred to as emergent routines. Dispatchers are trained on the dynamics of the system so that they can determine what the appropriate course of action for a particular situation will be based on how the equipment will respond. Dispatchers make analytical decision based on their training, knowledge of the system and its dynamics, and past experience.

Scheduled routines are created and printed up by arrangers and kept in a book for the dispatchers by the date the routines are to be implemented. Before implementing these scheduled routines, dispatchers review them to make sure they are electrically sound and that the switching orders on the job tickets are correct. Scheduled routines are prepared weeks ahead of time in many cases, so dispatchers must also consider other factors when determining whether a scheduled routine should proceed. These factors include: (1) weather conditions; (2) things that may have happened since the orders were written, like a cable fault or a down wire; (3) current emergent situations that may affect priority; (4) actual capability and load requirements; and (5) availability of necessary field personnel. All of these factors

must be considered before carrying out a scheduled routine so that its implementation does not jeopardize safety or system facilities. Dispatchers must consider the overall condition of the system that needs repair or maintenance in light of the fact that any particular order may affect other systems that are not part of the scheduled routine. Dispatchers can modify switching orders without approval—about 25% of scheduled routines are changed on a daily basis. If for some reason an order cannot be implemented on the scheduled date, the dispatcher cancels the routine and returns the order to the arranger to reschedule. Dispatchers have the authority to cancel a scheduled routine without consulting a shift supervisor if, after reviewing the order, they determine that the job should not be implemented. However, if they have any uncertainty about canceling a scheduled routine, dispatchers should contact their shift supervisor prior to doing so.

In emergent situations, such as a power outage, the dispatcher is responsible for evaluating the impact of the power interruption, preparing appropriate routines to repair and restore power, and directing field personnel in implementing the routines. First, the dispatcher must evaluate how widespread the power interruption is based on the information he initially receives. Second, the dispatcher will then dispatch field personnel to locations reporting outages to investigate and determine exactly what happened. The dispatcher also relays to the field personnel all the information he has received from customers reporting on their outage to assist the crew to find the source and cause of the power interruption. The information from the actual site of the power interruption is critical and the dispatcher relies heavily on specific information from field personnel to determine the process by which equipment can be isolated and fixed and power restored to the customers. In addition, dispatchers determine how long it will take to repair and restore power to customers based on estimates from the field personnel. Although the dispatcher can create a routine to some extent based on his training and experience, he must create the routine “on the fly” or “from scratch” with fairly short notice, for each emergent situation, as each situation is unique. In creating such a routine, the dispatcher must decide which customers he can temporarily restore power to, if possible, and which customers must wait for the overall repairs to take place. Once the dispatcher has designed the emergent routine, he must then determine if there are

sufficient and appropriate field personnel available to carry out the emergent routine. When emergent situations arise, dispatchers have the authority to re-prioritize existing jobs so that field personnel are utilized at locations in order of job importance and according to their appropriate skill levels. Once the field personnel are in place, the dispatcher then gives field personnel step-by-step instructions for the routine by radio, or sometimes by cellular phone. Unlike scheduled routines, field personnel do not have copies of emergent routines. The dispatcher directs the field personnel by radio, using ComEd's three-part communication to minimize and eliminate operating errors on the field. The dispatcher gives an operating order to a field operator. The operator is then required to repeat the order back to the dispatcher. The dispatcher then tells the operator whether the order, as repeated to him, was correct or incorrect. It is the dispatcher's responsibility to enforce the three-part communication and make sure that the field personnel understand the directives correctly, as dispatchers are held accountable for how they direct field personnel in carrying out their duties. Because field personnel do not have copies of the routines they are performing, they are totally dependent upon the dispatcher to guide them safely through their work and to release them when their work is complete.

In addition to their responsibilities pertaining to scheduled and emergent routines, dispatchers are also required to maintain voltage levels on the system. The whole system's stability is determined by voltage levels and if they are not maintained properly, the entire system could collapse and cause a blackout in the entire northern third of Illinois. Dispatchers must maintain station settings at appropriate levels so customers receive the proper level of electricity for their needs and within the high and low range limits recommended by the ICC. Dispatchers have discretion to determine where voltage levels should be set based on factors such as weather conditions, customer demands, and dynamics of the entire system. For example, dispatchers may decide that they will raise voltage levels at a station on a hot day early in the morning knowing that as the load on the system increases, the voltage levels will decrease. Such decisions are made by dispatchers independently at their discretion based on the actual, current status of the system and related factors.

Dispatchers are assigned field crews from the particular crew supervisor. The load dispatchers, for example, do not have any direct influence on which crew gets assigned to them on any given day. However, if a dispatcher determines that he needs additional operators than he has been assigned, he can request that more operators be assigned to him. Dispatchers have the authority to determine what particular type of field personnel to dispatch to certain types of jobs. Dispatchers must determine based on what their needs are, whether orders can most efficiently and correctly be handled by substation operators or troubleshooters or overhead electricians, for example. Dispatchers also have the authority to decide what crew they will dispatch to certain work sites based on the priority level of the job and the skill levels of the field personnel.

Dispatchers also have the authority to approve overtime work for operating personnel and repair crews in the field and obligate ComEd financially to pay these employees overtime compensation. Dispatchers do not have to seek prior approval before determining that overtime work is necessary. Dispatchers have the sole authority to decide when overtime work is necessary to complete a job in progress. Dispatchers may also decide to hold repair crews for overtime in anticipation of future work, such as when other field personnel are investigating a problem and the dispatcher anticipates that repair needs are forthcoming. When the need for overtime work arises, the dispatcher first determines how many personnel he needs to work overtime to get the job done. The dispatcher then calls the duty foreman or his supervisor to let them know that a crew is needed for overtime work. Supervisors of each group of field personnel generate an overtime list and dispatchers go by this list when soliciting personnel for overtime work. Overtime is first offered to employees who have the least amount of overtime hours at that time and up the list. The only exception shown at hearing was if there was only one crew working a shift and something came up that required the crew to stay over to repair it. In this situation, the dispatcher would have authority to hold over that crew without going by the overtime list. Evidence presented at hearing showed that while dispatchers have the authority to directly call employees regarding overtime work, on most occasions, the duty foreman or supervisor called in overtime crew instead.

Evidence presented also showed that if no one volunteered for overtime, the foreman would assign personnel to the dispatcher for the overtime work.

As previously stated, dispatchers are held accountable for how they direct field personnel in carrying out their duties. For example, dispatchers are held accountable for how long it takes a repair crew to get a job done and if the job takes too long to complete, dispatchers may be questioned why. Dispatchers monitor time that it takes to repair certain types of switching orders, so when a job on the field begins to exceed typical estimations, the dispatcher has the responsibility to check in on that crew, determine if there are any problems, and make sure that they can complete the job in a timely manner. In addition, field crews must report to the dispatcher once they have completed a job or before leaving the site at the end of their shift so that the dispatcher can keep track of the status of all jobs he directs. However, dispatchers are not involved with formally evaluating field personnel or any other ComEd employees.

Dispatchers are also formally evaluated based on how they measure up to goals set for them by the DDC management. The DDC management is comprised of the DDC director, the DDC operations manager, the clearance manager, and the shift managers. Formal dispatcher evaluations are conducted between the dispatcher and the supervisor and dispatchers have the opportunity to state on the evaluation forms what they have done during the review period to meet specific goals and provide specific examples.

There are various resources available to dispatchers for reference in carrying out their duties and responsibilities. There are station write-ups, guides, troubleshooting guides, procedure booklets, and guidelines on how to take equipment out of services. Station write-ups are switching routines for normal circumstances. Other guides include relay target guides and an alarm response guide for the SCADA system. The SCADA system is the electrical representation of the substation and the equipment at the substation. The SCADA system provides the dynamic state of the equipment by giving dispatchers the status of all the breakers and current amp readings and voltage readings. There is also available a training manual for load dispatchers that addresses topics covering any situations that may come up in the course of the dispatchers' duties. Dispatchers also use a map that shows not only the electrical connectivity of

circuits, feeders, equipment and their configurations, but also provides a geographical reference as to where certain facilities are located on the ComEd system. Dispatchers also have access to a database program used by arrangers in scheduling routines. Arrangers use this program when there is scheduled work in order to set forth the switching steps for the routine. In addition to the switching steps, other information such as points of isolation and time scheduled to be off are entered. All the steps and input is then stored. Dispatchers can access this database when something has happened on the system or emergent work arises to review the historical data of the particular equipment at issue and determine whether or not the past switching orders may be applicable to the current situation. This database, however, is not to be used as a way of isolating emergent work and does not provide a past switching order for every situation. By using the database, dispatchers can write emergent routines more quickly and thus, speed up the process of restoring power to customers. Although various resources are available to dispatchers for reference in carrying out their responsibilities, there was nothing to indicate that these resources cover every potential contingency that may arise or may be used by dispatcher in the course of their work. In addition to guidelines provided by ComEd, dispatchers must also abide by guidelines and directives established by various governmental entities. For example, the City of Chicago requires certain notification if a power outage affects the City of Chicago, such as the boundaries of the outage so that police and fire personnel can be dispatched to those areas to prevent harm to the public.

Dispatchers do not have the authority to hire, fire, or promote employees, transfer employees to another department, layoff or recall employees from layoff, or grant employees vacation time off. Although dispatchers do not have the authority to reprimand field personnel themselves, they can and do report misconduct. For example, dispatchers do not send employees home for insubordination in the field. But when a field employee refuses to carry out instructions given to him by his dispatcher, thereby jeopardizing customer service and possibly the safety of other field personnel, the dispatcher can either contact that particular employee's field supervisor to address the problem and or the shift manager to resolve the problem quickly. With respect to compensation, dispatchers are exempt for the purposes of overtime. Any additional time that dispatchers work beyond their normal 2,080 hours per year is paid at a

straight time rate. ComEd has a test it administers to its supervisors, such as the shift managers.

However, dispatchers do not, and are not required to take a test to become a dispatcher.

ANALYSIS

The Employer contends that dispatchers are statutory supervisors and that the petition must, therefore, be dismissed. The Employer asserts that under the Supreme Courts Recent decision in *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1867 (2001) and the Seventh Circuit's decision in *Southern Indiana Gas and Electric Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981) the Board must find the dispatchers herein to be supervisors within the meaning of Section 2(11) of the Act. The Petitioner, on the other hand, contends that the dispatchers are not supervisors within the meaning of Section 2(11) of the Act. In support of its position, the Petitioner cites the Board's decision in *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), involving employees engaged in similar functions to the instant dispatchers. Thus, the issue to be decided in the instant case is whether the load and operating dispatchers employed by ComEd are supervisors within the meaning of the Act.

Section 2(11) of the Act sets forth the test to determine supervisory status:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1867 (2001), *citing NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994).

It is well established that Section 2(11) of the Act is to be read in the disjunctive and that "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert.

denied 338 U.S. 899 (1949). However, the “Board also has a duty...not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect.” *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), enf’g. 171 NLRB 1239 (1968), cert. denied 400 U.S. 831 (1970).

In the instant case, the issue of whether or not the load and operating dispatchers are supervisors hinges on whether the dispatchers use “independent judgment” in the exercise of the Section 2(11) indicia regarding assigning work and responsibly directing employees in their work or whether their assignment of work and direction of employees is “merely routine” or of a “clerical nature”. Applying the Section 2(11) criteria with regard to the indicia of the assignment and responsible direction of work “often is a difficult task as the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and the act of supervision.” *Mississippi Power & Light Co.*, *supra* at 969 citing *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993). As suggested by the parties citation to differing and conflicting precedent, the issue of the supervisory status of employees who perform functions similar to those involved herein has been somewhat controversial and subject to differing interpretations regarding the application of Section 2(11) to their job functions. As set forth by the Board in *Mississippi Power & Light Co.*, historically the Board found:

[T]hat workers who monitored the transmission and distribution of electric power, designed some or most of the switching sequences, and directed field employees in carrying out the switching orders were not statutory supervisors. The Board reasoned that these workers did not exercise independent judgment in directing field employees in carrying out the switching orders or in the incidental assignment of employees during outages and other emergencies. The reviewing courts, however, regularly denied enforcement of the Board’s decisions and found that these positions were supervisory. *Mississippi Power & Light Company*, *supra* at 968.

In *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), based upon the court reversals, the Board reassessed its position regarding this type of employee and found that they do use independent judgment in responsibly directing other employees and assigning them work. *Big Rivers* was the controlling

precedent until the Board's decision in *Mississippi Power & Light Company*, *supra*. In *Mississippi*, the Board noted that while there were differences in the job duties of the dispatchers in that case from those in *Big Rivers*, it would, nevertheless, find the dispatchers therein to be supervisors if it continued to follow the precedent in *Big Rivers*. The Board, however, then determined to overrule *Big Rivers*. In support of its decision to overrule *Big Rivers*, the Board noted the changing nature of the workforce since 1947 and the increasing reliance of employers on greater accountability among employees and quasi-professionals and quasi-overseers. In the Board's view, it and the courts must take into account these changes in applying its analysis of Section 2(11) to these more independent, quasi-professional and quasi-overseer employees⁵.

After overruling *Big Rivers*, the Board went on to assess whether the dispatcher-type employees in that case used independent judgment in the exercise of the only Section 2(11) indicia at issue in that case - the assignment of work and the responsible direction of employees. In doing so, the Board very specifically and carefully delineated the judgments used by the dispatcher type employees in connection with the exercise of the Section 2(11) indicia in issue from the exercise of judgments that they used in performing their jobs that had no nexus with any Section 2(11) indicia:

Our dissenting colleagues' analysis, as well as the courts analyses in the cases they cite, fails to appreciate the distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees. Thus, it blurs the difference between the exercise of considerable judgment by the dispatchers in designing, adapting, and modifying switching esquences - which are the dispatcher's own tasks as employees - and the more circumscribed judgment entailed in the act of

⁵ The Board to account for the changing nature of the work force in its analysis of the application of Section 2(11) to dispatchers by analogy relied upon its application of Section 2(11) to charge nurses - "...the exercise of even critical judgment by employees based on their experience, expertise, know-how, or formal training and education does not, with more constitute the exercise of supervisory judgment." *Mississippi Power & Light Company*, *supra* at 970.

communicating or relaying the sequences to field employees. They, therefore, reach an incorrect and, we believe, untenable result. *Mississippi Power & Light Co.*, *supra* at 974.

After delineating the judgments exercised by the dispatchers, the Board examined only those judgments used by the dispatchers in assigning work to field employees and in responsibly directing field employees. With regard to assignment of work, the Board found that the role of the dispatchers was limited - the decision to call out employees to resolve emergencies was found to be a collaborative decision with the field supervisors or troublemen - and was usually based upon the field supervisor's or troubleman's assessment. Similarly, the Board found that the dispatcher's other assignment functions, including establishing priorities of work were limited by pre-existing rules, policies and procedures. Thus, in the Board's view, the dispatchers did not exercise sufficient independent judgment with regard to the 2(11) indica regarding the assignment of work. With regard to the responsible direction indica, the Board found the dispatcher's independent judgment in designing the switching orders by itself involved no exercise of supervisory indica vis-à-vis other employees - *e.g.* there was no nexus between that exercise of independent judgment and one of the twelve list 2(11) indica. It is only at the implementation stage of the order that the dispatchers exercise a potential supervisory indica - directing other employees in carrying out the complex switching order. In the Board's view, the judgment exercised by the dispatchers in responsibly directing the field employees was merely that of relaying the switching order to the field employees, typical a field supervisor, which the Board found to be a routine, clerical function, involving no independent judgment.

In its brief, the Employer contends that the Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*, *supra* effectively overruled *Mississippi Power & Light Co.*, *supra*, and that *Mississippi Power & Light* can no longer serve as a viable precedent. *Kentucky River* involved the issue of whether registered nurses were supervisors within the meaning of Section 2(11) of the Act, and the Board's exclusion of "professional judgment" from being consider as "independent judgment" with regard only to the 2(11) indica regarding the responsible direction of other employees. Very simply

stated, the Supreme Court found that the Board may not categorically exclude “professional” judgment in determining whether an employee exercises independent judgment in “responsibly directing other employees” 121 S.Ct. 1871. Thus, a person that uses “independent judgment” in responsibly directing other employees is a supervisor within the meaning of Section 2(11) of the Act, regardless of whether that independent judgment stems from professional status or business experience. The Supreme Court made it clear that the “test for supervisory status and the exercise of independent judgment applies no differently to professionals than to other employees”. 121 S.Ct. 1871. There can be no doubt that this admonition applies across the board to all categories of employees and there can be no differences in standards for determining supervisor status for any category of employee, not just professionals.

In *Kentucky River*, the Supreme Court agreed with the Board’s position that the burden of proof for supervisory status is on the party asserting that an employee is a supervisor. 121 S.Ct. 1866. The Supreme Court also found that the term “independent judgment” is ambiguous with respect to the degree of discretion required for supervisory status and, therefore, that “It falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies”. 121 S.Ct. 1867. The Supreme Court further found that the degree of “independent judgment” might be “reduced below the statutory threshold by detailed orders and regulations issued by the employer”. 121 S.Ct. 1867.

Contrary to the position of the Employer, I find nothing in the Supreme Court’s opinion in *Kentucky River* that either explicitly or implicitly overrules the Board’s findings in *Mississippi Power & Light* or the legal standard applied by the Board in that case. In analyzing whether the dispatchers in *Mississippi Power & Light* used independent judgment in assigning work and responsibly directing employees, the Board’s analysis rested entirely upon determining the “scope of discretion” that qualifies as an exercise of independent judgment which is within the Board’s discretion as set forth by the Supreme Court in *Kentucky River*. The Board in assessing the “scope of discretion” exercised by the dispatchers in *Mississippi Power & Light* did not categorically exclude any judgments or discretion exercised by the dispatchers based upon their technical expertise. The only discretion and judgments excluded from

consideration were those that were not utilized in connection with any Section 2(11) supervisory indicia - e.g. those that had no nexus to any supervisory indicia and are therefore irrelevant in determining supervisory status. Such an exclusion is mandated by the wording of Section 2(11) which specifically requires that the independent judgment be used in exercising the supervisory indicia. Thus, contrary to the Employer, I find that the Board's decision in *Mississippi Power & Light* is still good precedent and whose principles are binding upon the undersigned to the extent applicable to the facts found herein, rather than those set forth in *Southern Indiana Gas and Electric Co. v. NLRB*, *supra*.

Applying the principles set forth by the Board in *Mississippi Power and Light Co.*, *supra*, I must first identify the Section 2(11) supervisor indicia exercised by the employees whose status is in question, in this case, the dispatchers. Then I must determine what specific judgments are used by the dispatchers in exercising the Section 2(11) indicia in question, and finally I must weigh all the circumstances that impact upon the exercise of that judgment to determine if the dispatchers have a sufficient degree of discretion such that the exercise of their judgment in connection with Section 2(11) indicia qualifies as "independent judgment". Applying these criteria to the dispatchers in the instant case, based upon the evidentiary record, I find that the load and operating dispatchers have sufficient discretion with regard to the exercise of their judgment as to the assignment and the direction of the work of the field employees to be supervisors. I find that there is sufficient evidence to show that these dispatchers assign work and responsibly direct other employees in the course of their responsibilities and in doing so, that they are required to, and do, in fact, exercise independent judgment and discretion. Specifically, once a field crew is assigned to a dispatcher, that dispatcher is solely responsible for directing that crew in their work activities, whether they are scheduled or emergent. The record herein, unlike that in *Mississippi Power and Light Co.*, *supra*, does not demonstrate that the Employer's dispatchers are so constrained and limited by existing rules, policies, and standards so as to relegate their exercise of judgments to that of routine, clerical type of judgments. Rather, the record demonstrates that the dispatchers herein use considerable independent judgment in exercising the Section 2(11) indicia regarding the assignment of work and responsible direction of employees.

With respect to emergent work, and to a lesser extent with regard to scheduled maintenance tasks, I find that the evidence clearly shows that dispatchers have full authority to direct field personnel as they see fit and that they must exercise discretion during emergent situations. When emergent situations arise, dispatchers oversee and direct field personnel through every step from investigation to repair to restoration of power. The dispatcher decides which personnel he will send out to investigate the situation and, based solely on their feedback and his personal knowledge of the system, the dispatcher alone must create the orders necessary to resolve the situation. The dispatcher also determines what type and how many field personnel are necessary to carry out the orders based on the personnel's abilities and skills and verbally directs them through the repair process step-by-step. In *Pioneer Hotel and Gambling Hall, Inc.*, 276 NLRB 694, 697 (1985), the Board held that an employee who uses his judgment in assigning work to employees was a supervisor. Further, in *Dale Serv. Corp.*, 269 NLRB 924 (1984), the Board found that the senior operators in that case responsibly directed other employees in the course of their duties as they "had the authority to assign operators to specific tasks, based in part on the senior operators' assessment of the employees' abilities and the expertise required." *Id.* at 924. The record clearly shows that dispatchers do not need to consult their own supervisors with the emergent routines they create or seek approval before implementing them. Based on the record in the instant case, I find that the duties performed by dispatchers during emergent situations demonstrate the exercise of independent judgment in connection with the Section 2(11) indicia of assigning work and responsibly directing employees such as to confer supervisory status upon them. *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972); see also, *DST Industries*, 310 NLRB 957 (1993).

The Petitioner contends that the discretion of the dispatchers is circumscribed by Employer rules and policies limiting the dispatchers' discretion such that it is not independent judgment, noting that the Board has held that the performance of dispatching duties in conformity with an employer's instructions, practice, and set pattern, within parameters set by the employer, does "not require a sufficient exercise of independent judgment to satisfy" the statutory definition of a supervisor. *Mississippi Power & Light Co.*, *supra*; *Express Messenger Systems*, 301 NLRB 651, 654 (1991). However, the record herein shows that

while the dispatchers may have various guidelines and resources to references to assist them in designing and implementing emergent routines, the available resources do not cover every possibly potential contingency that may arise in a power outage situation. Further, the record demonstrates that the dispatcher is still required to make many complex choices, and these materials merely assist the dispatchers in making choices, rather than dictating the choices that must be made. Thus, unlike the record in *Mississippi Power & Light Co., supra*, the record herein does not demonstrate that the dispatchers exercise of discretion and judgment is sufficiently limited by existing rules and policies as to negate its being “independent judgment”.

I further find that ComEd dispatchers are supervisors because they are involved significantly with assigning work to the field personnel. First, a dispatcher has the authority to decide if he needs additional field personnel dispatched to a work site beyond what has already been assigned to him. Second, field personnel are required to contact the dispatcher directing them when they have completed a task or at the end of their shift to find out if they can leave the site or if they must remain on site to complete certain jobs. Third, dispatchers have full authority to determine when field crews need to be held over for overtime work. When dispatchers hold employees beyond their shift for overtime, they make this decision without consulting or obtaining approval from any other management personnel. Overtime work is often necessary during emergent situations and, as discussed above, dispatchers and field personnel are under pressure to repair equipment and restore power to customers as efficiently and promptly as possible. In *Pioneer Hotel*, 276 NLRB at 697, the Board held that an employee with “authority to give overtime work” was a supervisor. *See also Dale Serv. Corp.*, 269 NLRB at 924-25, (as part of responsibly directing other employees, “[s]enior operators have the authority to evaluate the workload, and, consequently, to assign overtime work to operators; to send operators home in the absence of work; and to call both operators and maintenance employees in to work, all without the managers’ prior approval”). Fourth, although field personnel have field supervisors or duty foremen supervising them during normal business hours, they are supervised by the dispatchers for a large part of the Employer’s work day; that is, for all of the hours outside of 7:00 a.m. through 3:00 p.m. Finally, while not a factor

always considered by the Board, as noted above, dispatchers are accountable for the work done by field personnel under their direction; thus, the record shows that when field personnel take longer than typically necessary to complete a job, the dispatcher is the one responsible for justifying or explaining what happened. See, *Custom Bronze & Aluminum Corp.*, *supra*, at 398.

The Petitioner, however, contends that the dispatchers do not exercise sufficient discretion when making decisions pertaining to overtime. The Petitioner relies on the fact that dispatchers are not the ones who actually contact employees to come in for overtime and because the process by which employees are called for overtime is determined by their respective collective bargaining agreements. I do not find these points to be persuasive because what is important in the instant case is the fact that the dispatcher have the authority to make the actual decision to have employees work overtime and, in doing so, commit the Employer to a financial obligation. In this respect, the dispatchers act much like higher level management which may decide the necessity of working overtime and the numbers of employees needed, but leaving to lower level supervisors the determination of the specific employees to be assigned the overtime.

The Petitioner points out the fact that dispatchers do not have the authority to impose discipline directly to employees, but only report employee misconduct to appropriate supervisors. That record shows, and the Employer admits, that the dispatchers do not exercise the full range of all twelve supervisory indicia listed in Section 2(11)⁶. It is well settled that it is sufficient for a finding of supervisory status that only one of the indicia be exercised with independent judgment. Thus, the fact that the dispatchers may not exercise some of the indicia or that they may work in cooperation with field employees does not mean that these dispatchers do not assign them work or direct them.

⁶ The Employer in its brief contends that the dispatchers effectively recommend disciplining employees. However, the record merely demonstrates that the dispatchers relay problems with employees to the field supervisors or higher management. The record does not show that they make recommendations regarding what should be done with the problem employee, that management follows any recommendations, or that management in most cases takes action on the information relayed to them.

Accordingly, based upon the above and the record as a whole, I find that the dispatchers that the Petitioner seeks to represent are not employees within the meaning of the Act. Rather, I find these individuals to be statutory supervisors. I shall therefore dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in the above matter be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by August 20, 2001.

DATED August 6, 2001 at Chicago, Illinois.

/s/ Elizabeth Kinney
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